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# CANADA'S NATIONAL STATUS

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DURING the Great War and since its conclusion there has been much loose thinking and writing, both within the British Empire and without, about the status of the Dominion of Canada. The note has been one of exaggeration rather than of sobriety. As a consequence ignorant misinterpretations are abroad which need to be challenged. Canada has everything to lose if its relation to the Empire is not made clear to foreign nations, especially to the United States. Developments of both a domestic and international nature—and there are many of them—may lead to the perpetuation of ignorance and may complicate further advance, unless their essential nature is made plain. Finally, the status of Canada, if clearly understood and judicially estimated, is in itself a challenge to the political dangers of the past and an element of international promise for the future.

## I

The history of Canadian autonomy falls naturally into two periods; first, from 1867, when the Dominion was created by an Act of the Imperial Parliament, to 1914; and second, from 1914 to the present time. The first period was characterized by growing assurance, and the second period is the period of national manhood, suddenly matured by the most tragic events in history. Scarcely had the Dominion been created when a national sentiment began to gather. At first insignificant and academic, it gained strength until within a few years it made momentous contributions to Canadian history. Canada began with many curtailments on self-government, and heavily shackled in domestic affairs. Canadian legislation was liable to imperial disallowance. The Governor-General was explicitly ordered to

reserve for the consideration of the British Cabinet any Acts of the Canadian Legislature dealing with a long list of specifically enumerated subjects, although these were of purely Canadian interest. The defense of the Dominion was in an ambiguous state, with Imperial officers still in command of Canadian forces. There was no Canadian Supreme Court. Canada could not control immigration from the British Isles. Canada had little or no place in international treaties or in foreign affairs.

Almost at once developments began. A Supreme Court was set up at Ottawa which has lent dignity and confidence to the Canadian judiciary. The Governor-General's office was reconstructed, so that to-day he can perform no official act and carry out no executive or administrative functions on his own initiative, but must act on the advice of his responsible Cabinet Ministers in the same manner as the Crown acts in Great Britain. In trade and commerce, however, the greatest advances were made before 1914. With the trade depressions of the late 'seventies Canada was forced to seek wider markets for her exports and the problem of commercial treaties was forced to the front. At first the Imperial Government conceded only the right to Canada of settling the details of such treaties. But Canadian Ministers were unwilling to act as a kind of glorified civil service for the Imperial Government, which finally conceded to Canada the right to use its own Ministers as actual negotiators. No sooner had this concession been granted than complications arose. It was evident that Great Britain could no longer expect to make general commercial treaties which would bind Canada, and the plan was soon adopted of inserting a clause which gave to Canada the right to adhere or to refuse to adhere to such treaties. This advance in turn raised a further question whether Canada should be bound by old general treaties in the framing of which there had been no consultation with Canada nor agents acting for Canada. When a scheme of preferential tariffs within the Empire was in the air, it was found that existing treaties precluded such preference without the inclusion in it of all foreign countries with most-favored-nation clauses in their treaties with Great Britain. Finally regulations were drawn up in 1895 which hold the field substantially to the present time. Any

treaty must be made between the Imperial Government, not the Dominion of Canada, and the foreign State concerned. Since final responsibility must remain with Great Britain, independent powers of negotiation could not be granted to Canada. Negotiations must be conducted by the British representative aided by Canadian representatives as second plenipotentiaries or as subordinates. Any treaty which might be concluded would be signed by the plenipotentiaries only after its terms had been approved by the Imperial and Canadian Governments. It would ultimately be ratified by the Crown acting on the advice of the British Cabinet, if the Canadian Government so desired; or, in the event of legislation being requisite to make its terms effective, if the Canadian Parliament so desired. Conditions of negotiation were laid down: concessions made to any foreign Power must be made to any other foreign Power having by existing treaties most-favored-nation rights in Canada; any concessions so made must be extended without compensation to all British possessions; no concessions must be accepted from a foreign Government which would be prejudicial to other parts of the Empire.

The position which Canada now occupies can be summed up briefly: Canada is not bound by any commercial treaty to which its consent has not been given. Canada will be consulted by the Imperial Government when a general commercial treaty is under consideration, in order that special concessions, if desired by Canada, may be secured. If Canada wishes to establish closer commercial treaties with a foreign State, the Imperial Government will appoint Canadian plenipotentiaries to carry on negotiations and they will sign jointly with an Imperial representative any treaty which may arise out of the discussions. The interests of the Empire at large must not be sacrificed, and Canada must extend to the Empire concessions granted to a foreign Power. The treaty must be ratified by the Crown on the advice of the Imperial Cabinet acting on the request of Canada.

In strictly political treaties there has been no fundamental advance in this period, as international responsibility must lie with Great Britain. It is unnecessary then to lay stress on details of method which might give a false impression of development.

On the other hand, to international conferences on miscellaneous questions of general concern, such as the Radio-Telegraphic Conference of 1912, Canada sends delegates with full powers under the Great Seal of England, who act as plenipotentiaries for the Dominion. The essential nature of the situation lies in the fact that Canadian plenipotentiaries are not included among the British group who must cast their vote as a unit. As arrangements now are, Canada has plenipotentiaries of its own acting independently of those from Great Britain, and may accordingly differ in opinion from the Imperial view. It is well, however, to remember that the Canadian plenipotentiaries receive their fullness of authority at the hands of the Imperial Executive and that the final ratification rests with the Crown acting on the advice of Imperial Ministers.

After federation, devolution of authority in relation to defense was slow. Imperial money was freely spent on fortifications, and an Imperial force was available to suppress the Red River Rebellion in 1870. Although Canadian troops successfully coped with the much more serious North West Rebellion in 1885, yet the Imperial Government continued to maintain garrisons in Canada. During the Boer War these were withdrawn and not replaced. With their withdrawal the presence of Imperial officers in charge of the Canadian militia became more and more anomalous, especially as their lack of discretion led to serious administrative difficulties. After the Canadian Government had dismissed one of them Canada took over authority. The Imperial Government has no control over Canadian troops raised for home defense, and there is no agreement between Great Britain and Canada to send troops overseas. Any aid given to the Empire outside Canadian territory depends entirely on the will of the Canadian Parliament for the time being. Canadian soldiers serve overseas voluntarily; or, if organized, under a special Canadian law. The same regulations govern naval affairs, so that in the control of the supreme obligations of citizenship Canadian autonomy is complete.

During these years the process of consultation was carried forward beyond mere irregular Conferences. After 1912 Canadian Cabinet Ministers were admitted as members of the Imperial

Defense Committee where they received full and complete information on defense, foreign affairs, and political treaties, and where all the secrets of Imperial policy were disclosed to them. In the final analysis, of course, this Committee has no executive authority for the Empire; but Canada began to occupy a place in discussions of a distinctly responsible nature. On the other hand, it is well to emphasize the fact that Canada during these years avoided any attempts to set up an Imperial Empire Cabinet.

With the outbreak of the Great War, the relationship between Canada and the Empire became clearer. The Imperial declarations involved Canada automatically, yet Canada had no say in situations in which it had a vital interest. The crisis brought to light the nature of the constitutional ties. Not only was Great Britain solely responsible for the declarations of war but the Imperial decisions placed Canada at once in a state of war. Canadian citizens became the legal enemies of those nations against whom the Imperial Government began hostilities, and Canadian territory was at once liable to possible invasion or attack. On the other hand, the Imperial Government was meticulous in guarding Canadian autonomy. No demand was made for men or for money. Not even the slightest influence was brought to bear which might have impaired Canadian self-government or wounded Canadian sentiment. The Imperial Government had no connection of any kind with the raising of Canadian troops, and Canadian military and naval activities remained entirely and exclusively in the hands of the Canadian Government and Parliament.

The War, however, emphasized the need for closer coöperation and as a consequence consultations developed in a marked degree. Canadian Ministers became members of the Imperial War Cabinet created by Mr. Lloyd George, and the Imperial War Conference of 1917 laid it down that the great Dominions were self-governing nations, which demanded continuous consultation in foreign affairs. The Prime Minister of Canada emphasized the situation. The English Premier was only *primus inter pares* and Canada was Great Britain's constitutional equal, preserving its full autonomy and its complete self-government, carrying on diplomatic correspondence no longer through the Colonial Office

but directly with the Prime Minister of Great Britain. Of course, it is necessary to walk carefully here. The War Cabinet possessed no final constitutional authority for the Empire. Its decisions remained mere decisions until concurred in by the Imperial and Dominion Cabinets. More important still, if the British members failed to secure the good will of the Dominion members, they could have their wishes carried out through the ordinary channels of the British Departments of State. Indeed, where agreements were forthcoming, the ultimate and international responsibility lay with the Imperial Cabinet.

In relation to the Peace and to the League of Nations a word must be said. At the Peace Conference Canada was assigned two delegates. Each delegation had the right to set up a panel from which the delegates present on any occasion might be chosen, and the Canadian delegates might be included by this panel system in the representation of the British Empire, which appeared under that name for the first time at a Peace Conference and presented its proposals and decisions after consultation with Canada. Canada, of course, possessed no vote apart from the British Empire, and the Canadian delegates signed the treaty as representatives of the King for the Dominion of Canada. The treaty was ratified for the Empire as a whole on the advice of the Imperial Foreign Secretary, after approval for Canada by the Canadian Parliament. It is true that Canada is a member of the League of Nations and that a Canadian representative may be elected to the Council, but the unity of the Empire is preserved by the Covenant's guarantee of the territorial integrity of its constituent members.

## II

The Dominion of Canada is an integral part of the British Empire. The growth of Canadian autonomy has therefore been necessarily limited by the legal and constitutional bonds which unite Canada to the Empire. There can be little doubt that emotion and sentiment play a large and important part in the relationship between Canada and Great Britain, and it is well that moral values should not be forgotten in the consideration of hard, legal facts. Great Britain recognizes that Canada has a

distinct national status and a distinct group life. There is no possibility in future of leaving Canadian opinion unconsidered or of curtailing full discussion in the delicate and dangerous realm of foreign affairs. Great Britain has accepted the fullness of Canadian citizenship, and if it still lacks an effective voice in the executive life of the Empire, the fault assuredly does not lie with the Mother Country. Constitutional reorganization lies in the hands of the Canadian people. In the meantime, the secret places of Imperial policy have been opened to Canadian statesmen, who can obtain as impartial and complete a knowledge of international affairs, of defense, of treaties and of conventions, as any member of the British Cabinet.

Although, however, Canadian autonomy is practically complete in trade and commerce, although Canadian opinion is practically decisive in political treaties affecting the Dominion alone, although Canada is a distinct member of the League of Nations with the right to representation on its Council, yet the witness which these developments bear is rather to the extreme limit of Canadian freedom within the Empire than to newly accepted positions in constitutional law. As the law of nations now stands Canada is not a sovereign State. However light the Imperial tie, as long as it exists, Canada cannot escape—under the political theories which at present prevail—the implications of the fact. In addition, the Imperial connection imposes boundaries on Canadian autonomy within the Empire. The internal and the external limitations of Canadian political authority can be clearly stated in terms of private and international law without in the least mortgaging the future or closing the gate to further developments.

The Imperial constitutional situation is unparalleled in history, and analogies drawn from Hanover or the Thirteen Colonies are, like most political analogies, barren of guidance. It is possible to say the same of the phrases which attempt to describe the conditions. "Autonomous nations of the British Commonwealth," the "League of Britannic Nations," the "Free States of the Empire," are terms capable of such complicated connotations and are all linked up with such varied political theories that none of them is conclusive. All that the historian or political



thinker can hope to do is to look at things as they actually are. He must see facts and their implications: first, that Canada is an integral part of the Empire; second, that Canada does not possess those adjuncts of political life which determine recognition as a state; third, that Canada has a distinct social, economic and political group activity peculiarly and separately Canadian; and fourth, that the generally accepted theory of sovereignty darkens the issues and that its abandonment will furnish the most necessary step in resolving the antinomies. Finally, he must recognize that political progress is best secured where the forms which give constitutions their concrete expression are behind rather than in front of general political education.

Canada is a Dominion "under the Crown of the United Kingdom of Great Britain and Ireland". Such is the preamble of the Canadian Constitution granted by the Imperial Parliament, and it is a fundamental condition on which Canadian executive, legislative and judicial authority exists. This fact is of more than academic importance. During a discussion in the Imperial Parliament on Irish affairs Mr. Bonar Law declared that "If the self-governing Dominions chose to say, 'to-morrow we will no longer make a part of the British Empire,' we would not try to force them. Dominion Home Rule means the right to decide their own destinies." Mr. Law's words need examination, and it is not without significance that during the same debates Mr. Lloyd George was careful to avoid the question of secession, and that on March 2, 1922, Mr. Winston Churchill during the committee stage of the Irish Free State Bill refused on behalf of the Government an amendment giving the power. He declared that the Dominions had never claimed nor had Great Britain ever admitted the right of secession. Mr. Law's phrase is capable of only one valid construction. If Canada expressed in unmistakable terms the desire of its people to sever the Imperial tie, the British Government would not attempt to resist by the armed forces of the Crown such a clearly expressed wish. But, as General Smuts clearly recognized for South Africa, Canada could not dissolve its connection with the Empire by a Federal Act of Parliament, because the Crown has not the constitutional power to assent to a Canadian Act outside the legislative compe-

tence of the Dominion Legislature. Canada has authority to legislate for "the peace, order and good government of Canada", and to pass an Act dissolving the Dominion as "under the Crown of the United Kingdom of Great Britain and Ireland" would be extraterritorial legislation of an extreme form and of undoubted invalidity. The constitutional dependence of Canada on the Imperial Crown can be abrogated only by an Act of the Imperial Parliament, and the announcement of Canada's severance from the Empire could take place only by Imperial and not by Federal legislation. Indeed the League of Nations itself confirms this opinion. Canada has a separate status within the League but contingent on its position as a constituent part of the British Empire, and the Covenant binds Canada with other members of the Empire to preserve the territorial integrity of the Empire. There thus emerges another fact, that in addition to an Imperial Act being the normal constitutional method of dissolving the relationship, there would also be necessary agreement on the part of the other constituent members of the Empire; otherwise the Covenant is futile and meaningless. The League of Nations in giving Canada a new position at the same time binds it closer to the Imperial Crown.

The Imperial tie raises the further question whether the Imperial Parliament can pass legislation applying to Canada. All along there has existed a tendency to curtail such legislation, but with the developments of recent years a claim has been made and concurred in by Sir Robert Borden that the sovereign legislative power of the Imperial Parliament is not only obsolete but invalid. The most probable opinion is that in future no Imperial legislation will bind Canada unless concurred in by resolution of the Federal Parliament. In addition, if Canadian proposals mature to obtain from the Imperial Parliament powers to confer extraterritorial effect for Federal legislation similar to that belonging to Imperial legislation, there will be less necessity for the exercise of legislative power for the Empire as a whole, although Imperial legislation would of necessity apply to Canadians as to other British subjects resident where the Crown possesses extraterritorial jurisdiction.

The question, however, has another aspect of vital importance.

Australia, New Zealand, South Africa and Newfoundland enjoy wide freedom to change their constitutions, but Canada has no authority either to alter the distribution of legislative powers or to vary the essential form of government—a fact upon which Mr. Mackenzie King relied in deprecating Mr. Rowell's claim that equality with the United Kingdom had been established and recognized. All changes made in the Constitution of 1867, other than those of small detail, have required Imperial legislation. The formation of the Federation has been treated as a covenanted occasion and explicit recognition was given to this treatment in 1907 by the Cabinets of the United Kingdom and of Canada when admission was made that the general assent of the provinces was necessary to any constitutional changes. Canada is thus dependent on the Imperial Parliament for any important alterations in the instrument of government. The problem is one of difficulty. Imperial legislation would undoubtedly be refused were there signs of serious provincial opposition. On the other hand, it would be difficult to get general provincial agreement to any increase of the Federal powers. The provinces are extremely suspicious of proposals which might appear to narrow their legislative spheres. In Quebec this is further complicated by fears that the special linguistic and religious rights of the province might be endangered if the Dominion were granted a general authority to alter the constitution.

In foreign affairs, Canada's connection with the Empire imposes obvious legal boundaries. In spite of all the phrases which have passed into currency, Canada has no international status. Even the treaties which Canada concludes in matters of trade and commerce acquire their force through the Imperial relationship. Canada cannot negotiate directly with a foreign country in the political or any other important sphere. If negotiations are necessary, or called for, or Canada is vitally interested, the Crown will act on Ministerial advice with the consent of the Canadian Government. In minor matters direct communication has taken place for many years, but the Imperial Government must learn of serious matters through the Governor-General and through the British Ambassador resident in the particular country. It is true that normally Canadian negotia-

tors will be employed, but if a treaty supervenes, it will be considered for international purposes an Imperial treaty. The informal agreements which Canada has concluded and to which reference has been made are of no international value, and neither the Canadian Government nor the foreign States have mistaken their character. Indeed in the arrangements for a Canadian Minister Plenipotentiary at Washington the diplomatic unity of the Empire has been expressly preserved. While the appointment will be made on the advice of the Dominion Cabinet, the responsibility and authority will rest with the Imperial Government, and the full powers granted to the Minister will be issued on the responsibility of the Imperial Foreign Secretary.

When the developments of recent years are judicially examined they prove that Canada's status in international law has undergone no fundamental change. The War Cabinet was merely consultative and had no collective executive responsibility for the Empire. Canada signed the Peace Treaty under authority from the Imperial Government. Canada's position in the League of Nations is due to its position in the Empire. The Covenant of the League has undoubtedly imposed on Canada new obligations of an international nature, but has given it no distinct international status. A possible declaration of war will best illustrate the exact state of affairs. Once the Imperial Government declares war, Canada is at war; and once a foreign State declares war against Great Britain, Canada is at war. In either case, Canada need not fight, need not supply a man or a ship or assist in any way, and might be prepared to preserve the most meticulous neutrality; but as international law now stands, Canada would be at war, and its territory and citizens liable to attack.

It may be pertinent to deal with the theoretical difficulty which for many minds prevents a just appreciation of the present position of Canada in the Empire. I have pointed out certain anomalies in this position, but must not on that account be regarded as endorsing the old view that political sovereignty by its very nature is one and indivisible, or that the logic of the situation leaves Canada with the alternatives of complete independence or permanent inferiority of status. The older doctrine of

sovereignty admitted no third course, but the active criticism of recent political thought working on such material as modern federations, leagues, and unions so abundantly provides, rejects that absolutism. No ancient formula of sovereignty, however embodied in present legal doctrines, can stay the actual process of political development. If the formula declares that there must be one single ultimate residence of all sovereign powers within a State, and the facts reveal a dual or multiple residence, so much the worse for the formula. Necessity modifies our over-simple or over-rigid theories. The strong persuasions of defense or finance, making for unity, have countered the tenacious differences of religion or race, and have thus created not only new forms but new degrees of sovereignty.

The changing relation of Canada to the British Empire, therefore, instead of flouting any eternal principle of political sovereignty, is one of the crucial series of data to which our theories of sovereignty must conform. It is not too much to say that in the modern political world we find States showing every degree of the integration and the separation of sovereign powers. If the Constitutions of the United States and of Australia formally allocate residual sovereignty to the participant States, while in the Dominion of Canada this pertains to the Federal Government, both are nevertheless forms within which the unity of a State is realized. If Australia assigns a variety of concurrent powers to the States and to the Federation, the system nevertheless is a working unity. If the Union of South Africa is to be called a Unitary State rather than a Federation, it presents a very different type of unity from that of the United Kingdom. We might go further and suggest that even in the so-called Unitary State, whatever its legal form, there are sovereign powers which in fact are and must be exercised by municipalities, counties and other units of administration. Why then, we may well ask, should not the British Empire remain a unity although the aspirations of its parts for autonomy find the completest expression they may desire?

It will be said by the legalists that there is no political unity where there is no final authority. In reply, two observations may be made. In the first place we should notice the significance

of the system, which has grown up particularly in federal states, by which the settlement of constitutional problems, where there is a question of conflicting claims to sovereign powers, is assigned not to Parliament but to courts. In other words these problems are regarded as subjects for interpretation and not for legislation, for adjustment and not for enactment, and the court in such a case may perhaps be fairly regarded as the representative, not of the parliamentary sovereign but of that more profound though less coherent will, the will of the people itself. This leads us to the further and fundamental consideration that the final unity of any State is to be sought not within the form of government at all but in the consensus of political opinion, in the communal will which sets up and pulls down the instruments of political power. If there is that underlying unity it can support the gradation and division of ostensible sovereignty. A house divided against itself cannot stand, but if there is a common foundation it will sustain, without danger of their falling asunder, the divisions within the house.

We need not therefore despair of the unity of the British Empire because Canada and its other constituents, as they attain political manhood, claim a political sovereignty of their own; nor on the other hand need we think it necessary to construct, in advance of evolution, artificial props such as an Imperial Cabinet with definite over-ruling powers. What is best and safest is to strengthen the foundations of the common will, to cultivate the common heritage, to develop the intercourse among the members of the far-flung Empire as well as among the responsible Ministers of every part; to enhance in a word that sense of unity which the possession of a great and common tradition has built up in history and in faith. And if the resulting development contradicts fond theories of sovereignty, we may offer these up, in thankfulness for the unity we maintain and achieve, as a cheerful and willing sacrifice.

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